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No. 84-1196

In the Supreme Court of the United States

OCTOBER TERM, 1984

CONTRACTOR UTILITY SALES CO., INC.,

Respondent.

VS.

CERTAIN-TEED CORPORATION,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Supreme Court should accept review of a diversity case lacking any precedential value involving an issue which was waived in the trial court and not mentioned in Defendant's oral argument on appeal.

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SUMMARY OF ARGUMENT

This is a diversity case without any precedential value. In addition, the issue raised by Defendant was waived in the Trial Court and abandoned in appeal.

ARGUMENT

The Defendant's Petition for Writ of Certiorari involves a diversity case with no questions of precedential value. There is no conflict between the circuits and no substantial issue to call for this Court's exercise of its supervisory authority. Instead, there is a claim that the Appellate Court did not specifically discuss an issue raised in the appellate brief of one of the parties.[1] Far from being "special and important", this situation arises in any appeal where an issue is abandoned.

The issue raised in Defendant's Petition for Writ of Certiorari to this Court is not of substance. Although fourteen (14) pages of the Defendant's appellate brief filed with the Seventh Circuit Court of Appeals argued this issue, any claim of error was waived in the trial court and also abandoned in oral argument before the Seventh Circuit.

A. The Trial Court.

The Trial Judge, Michael Mihm, offered Defendant the opportunity to satisfy itself as to the foundation for questioned data and suggested that he would consider a continuance if there were any claim of surprise.

> THE COURT: * * * And I would even consider request for brief delay in the trial at some time of the day if you require it or something like that. I am concerned. I dont feel that this ruling is necessarily inconsistent with my earlier rulings, but it could be

[1] The Plaintiff was also disappointed with the results reached by the Seventh Circuit Court of Appeals Appendix in this case. See Plaintiff's Petition for Rehearing. (App. 1)

> interpreted that way. I don't want to place either side in a position where they feel as a practical matter they have been surprised in the sense that they can't adequately represent their client's interest. * * *" (Tr. Vol. II, pp. 20-21)

The Seventh Circuit in another case decided during the pendency of the appeal of this case state that under similar circumstances the Defendant has waived any claim of prejudice.

> Canada Dry argues first that the Magistrate erred in admitting the damage summary charts before Canada Dry had received all the necessary workpapers and records underlying the summaries. This error, Canada Dry maintains, deprived it of 'any fair opportunity timely to discover the egregious error. . . .'
>
> * * *
>
> Even assuming that serious computational errors are contained in the charts, we think it inappropriate in the case before us to order a new trial. * * * Accordingly, if Canada Dry, once it learned of the damages charts, had asked for a recess to check the underlying calculations, a refusal by the trial court to allow Canada Dry sufficient time would presumably have been an abuse of discretion. This, however, did not occur. * * *
>
> * * * A contrary decision would reduce the incentive to test vigorously opposing evidence at trial. Instead there would be a new incentive to search transcripts after an unfavorable verdict in an effort to find a computational error of sufficient magnitude to mandate a new trial. * * * *Canada Dry Corp.* v. *Nehi Beverage Co., Inc.*, 723 F.2d 512, 523 (7th Cir. 1983)

In the instant case, Defendant refused all invitations to inquire into the foundation of the "Robintech Summaries".

Defendant rejected the Court's offer of a continuance and also rejected Plaintiff's offer to depose the employee who compiled the summaries. Defendant's counsel's response was that he would not depose the employee who compiled the original data if presented on a "Silver Platter".

> 3. Defendant's counsel, Geoffrey G. Gilbert, said to Affiant that he would not be available to interview or depose William J. Koch even if he were 'to be presented to him on a silver platter' prior to Monday, March 7, 1983. *Affidavit of James R. Potter* (P.App. 26-27)

When Court convened after the weekend on Monday, March 7, 1983, Defendant's counsel stated: "As I said to the Court on Friday, I don't consider it my obligation to assist the plaintiff in laying the proper foundation in proving his case. * * **" (Tr. Vol. VI, p. 85)

Defendant was not interested in verifying what it knew to be factual information. Defendant was preparing to use the "Robintech Summaries" as a basis for a second appeal; only this time the appeal would be on the "excessive" amount of damages.[2]

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[2] However, after the first appeal, the Seventh Circuit decided that much greater damages were "insufficient".

> Both parties appeal from the jury verdict awarding Cusco damages totalling approximately $9.7 million dollars on the fraud and breach of contract claims. *Cusco argues that the damages award is insufficient.* Certain-teed argues . . . that prejudicial errors of the trial court require a new trial. Surprisingly, *both parties present meritorious arguments which require us to vacate the judgment and remand the controversy for a new trial. Contractor Utility Sales* v. *Certain-Teed Products*, 638 F.2d 1061, 1079 (7th Cir. 1981) (emphasis added)

B. Oral Argument on Appeal.

With good reason, Certain-Teed abandoned this argument on appeal. It was not mentioned during oral argument nor was *Canada Dry Corp.* v. *Nehi Beverage Co.*, 723 F.2d 512 (7th Cir. 1983), attempted to be distinguished in any authority filed with the Court of Appeals. This fact was pointed out in Plaintiff's Petition for Rehearing.

> * * * Understandably, Certain-Teed did not mention any issue concerning the "Robintech Summaries" on oral argument before this Court. *Petition for Rehearing En Banc of Plaintiff-Appellee & Cross-Appellant*, App. p. 3.

Defendant's Petition for Rehearing also failed to acknowledge the Seventh Circuit's recent *Canada Dry* decision or explain why it refused to mention its "main point" during oral argument.

CONCLUSION

As pointed out to the Seventh Circuit in Plaintiff's Petition for Rehearing, damages awarded to Plaintiff at the first trial were found to be "insufficient". (Appendix, pp. 3-6) Despite the fact that damages at the second trial, both compensatory and punitive, were substantially less than those awarded at the first trial, Defendant now claims that the damages are excessive. Plaintiff was also denied a third trial on the issue of damages. Plaintiff forcefully urged their argument that Defendant's own projections showed compensatory losses several times the amount awarded at the first trial.[3] Those arguments, along with Defendant's were considered and rejected.

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[3] Defendant's Chief Financial officer projected the profit Defendant would *net after taxes* if successful in purchasing Plaintiff.

> I can't find any other deals that would provide us with after tax income of $8,358,000 on a most conservative basis for the next 3½ years. *Memorandum of F. Timpe*, dated 5-2-75, p. 1 (Pl. Ex. 1(j))

However, notwithstanding Plaintiff's own beliefs that the Seventh Circuit erred there is no issue involved in this appeal which meets the criteria for Supreme Court review. The Plaintiff-Appellant would, therefore, respectfully request that Certain-Teed's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-2278 and 83-2366

CONTRACTOR UTILITY SALES COMPANY, INC., Plaintiff-Appellee & Cross-Appellant,	)	Appeal from the Central District of Illinois
vs.	)	No. 77-3086
CERTAIN-TEED CORPORATION, Defendant-Appellant & Cross-Appellee.	)	Honorable Michael M. Mihm

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PETITION FOR REHEARING EN BANC OF PLAINTIFF-APPELLEE & CROSS-APPELLANT

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PETITION FOR REHEARING EN BANC OF PLAINTIFF-APPELLEE & CROSS-APPELLANT

SUMMARY

A petition for rehearing *en banc* is sought because this Court's decision is in conflict with an earlier opinion rendered by this Court in this case on the question of damages. *Contractor Utility Sales* v. *Certain-Teed Products*, 638 F.2d 1061 (7th Cir. 1981); and for the further reason that this opinion is in conflict with this Court's recent opinion of *Canada Dry Corp.* v. *Nehi Beverage Co., Inc.*, 723 F.2d 512 (7th Cir. 1983).

The original opinion by this Court in the first appeal decided that both parties presented "meritorious" arguments which required reversal. Despite the fact that this Court was satisfied that under the fraud count CUSCO met the "* * * clear, precise, and convincing' threshold burden, thus justifying submission of the fraud claim to the jury. * * *" (638 F.2d 1061, 1083), it reversed for a new trial on liability on only two grounds:

1. *Fraud Count*: Certain-Teed was given the opportunity to introduce Plaintiff's original complaint as an admission ". . . as a legitimate means of impeaching Lance's testimony." (638 F.2d 1061, 1085) (However, at the second trial, Certain-Teed did not even cross examine Lance on the original complaint.)

2. *Contract Count*: The case was remanded for a new trial with directions to exclude all evidence of alleged

oral promises under the contract count. (At the second trial, the jury was clearly instructed to consider oral promises only under the fraud count.)

However, upon remand the Trial Court again excluded, *in limine,* the identical proof of damage preserved in CUSCO's first appeal, and also excluded Certain-Teed's own projections which constituted proof of CUSCO's damages at the first trial. Certain-Teed's own projections were never suggested as grounds for reversal of CUSCO's $2.4 million damage verdict in the first trial; in fact, there was no appeal as to damages in the first trial by Certain-Teed. Nevertheless, the Trial Court limited CUSCO to proof of fraud, or reliance damages, through "Robintech Summaries". This resulted in a verdict of one-third the amount of compensatory damages awarded at the first trial.

Although Certain-Teed now appeals the damage verdict as excessive based upon hearsay "Robintech Summaries", Certain-Teed refused the opportunity to depose the custodian of the original records at trial. When a brief continuance was suggested by Judge Mihm, it was ignored. (Tr. Vol. II, pp. 20-21) Certain-Teed's counsel's response was that he would not depose the employee who compiled the original data if presented on a "Silver Platter".

> "3. Defendant's counsel, Geoffrey G. Gilbert, said to Affiant that he would not be available to interview or depose William J. Koch even if he were 'to be presented to him on a silver platter'

> prior to Monday, March 7, 1983." *Affidavit of James R. Potter* (P.App. 26-27)

When Court convened after the weekend on Monday, March 7, 1983, Certain-Teed's counsel stated: "As I said to the Court Friday, I don't consider it my obligation to assist the plaintiff in laying the proper foundation in proving his case. * * *" (Tr.Vol. VI, p. 85) Understandably, Certain-Teed did not mention any issue concerning the "Robintech Summaries" on oral argument before this Court.

The Trial Court's rulings requiring CUSCO to utilize proof of reliance damages, "Robintech Summaries", resulted in substantial prejudice to CUSCO on the issue of compensatory damages under the contract count.

I. THE COURT OVERLOOKED THE ISSUE OF DAMAGES EXCLUDED, *IN LIMINE*, AT THE SECOND TRIAL.

A. Expert Testimony

CUSCO has pursued two appeal, two trials and one interlocutory appeal on the issue of damage proof.[1] In the first appeal of this case, this Court found CUSCO's damage questions to be meritorious.

> "Both parties appeal from the jury verdict awarding Cusco damages totalling approximately $9.7 million dollars on the fraud and breach of contract claims. *Cusco argues that the damages award*

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[1] Interlocutory appeal on this same issue prior to the second trial was denied by this Court on March 12, 1982.

> *is insufficient.* Certain-Teed argues . . . that prejudicial errors of the trial court require a new trial. Surprisingly, *both parties present meritorious arguments which require us to vacate the judgment and remand the controversy for a new trial.*" *Contractor Utility Sales* v. *Certain-Teed Products*, 638 F.2d 1061, 1079 (7th Cir. 1981) (Emphasis added)

This Court's first opinion gave clear directions to the next trial judge to allow CUSCO to present its expert testimony on damages at the subsequent trial.

> "Cusco argues that the district court improperly excluded the damage projections of plaintiff's expert witness, Dr. Roger Kormendi. On remand, Cusco is free to present expert testimony on damages, and the trial court is obligated to judge the admissibility of that testimony in light of Rules 702-705 of the Federal Rules of Evidence, governing expert testimony. Although the court must decide questions of admissibility, the weight and credibility to be accorded expert testimony is properly left to the jury." *Contractor Utility Sales* v. *Certain-Teed Products*, 638 F.2d 1061, 1085, n. 32 (7th Cir. 1981)

Inexplicably both Judge Morgan and Judge Mihm barred, *in limine*, the same testimony preserved as an offer of proof in CUSCO's original appeal to this Court.

B. Certain-Teed Projections

Judge Mihm compounded this error by also excluding, *in limine*, Certain-Teed's own projections of CUSCO's earnings which formed the basis of CUSCO's compensatory award of $2.4 million damages at the first trial. This amount was recognized as "insufficient" by this Court in the first appeal of this case.

However, the Trial Court's, *in limine* rulings resulted in a compensatory award of only $800,000.00, one-third the amount of compensatory damages awarded in the first trial. Interestingly, Certain-Teed's own projections closely parallel and corroborate the expert witness testimony of Professor Kormendi. (See CUSCO's Plaintiff-Appellee & Cross-Appellant's Brief, pp. 9-11.)

CUSCO raised the *in limine* exclusion of Certain-Teed's projections of CUSCO's future earnings as one of its major points on appeal on the damage issue.[2] This Court's opinion does not address this issue notwithstanding its most recent decision in *Canada Dry Corp.* v. *Nehi Beverage Co., Inc.*, 723 F.2d 512 (7th Cir. 1983), on the very same issue.

> "* * * The evidence which Nehi offered consisted of a chart based on a study prepared by Canada Dry in 1978 showing sales and profit figures projected for 1978 to 1982 if Canada Dry were to implement the program. Canada Dry objects to the use of these projected figures in place of

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[2] These projections were based upon extensive studies over three years of CUSCO's business by Certain-Teed. With regard to these projections, Certain-Teed's chief financial officer, Fred Timpe, stated:

> "* * * I am convinced the numbers are conservative just like they have proven for the last three years during which we have recommended acquisition and could have gotten them into the fold at a fraction of today's asking price. * * *
> "I can't find any other deals that would provide us with after tax income of $8,358,000 on a most conservative basis for the next 3½ years." *Memorandum of F. Timpe*, dated 5-2-75, p. 1 (Pl. Ex. 1(j)) (P.App. 39)

post-1978 figures reflecting Nehi's actual business experience.

> "While there may be weaknesses in the use of this type of evidence, it is not incompetent evidence which would require overturning the jury award of compensatory damages. The weaknesses which Canada Dry points out go to the weight that should be accorded the evidence and not to its competence or admissibility. *Canada Dry Corp.* v. *Nehi Beverage Co., Inc.*, 723 F.2d 512, 523-524 (7th Cir. 1983)

CUSCO was prevented from presenting both its expect testimony on damages and Certain-Teed's own projections of damages. This was in violation of this Court's precedents in both its decision in the first appeal of this case and *Canada Dry*.

II. JUDGE MIHM'S *IN LIMINE*, EXCLUSION OF CERTAIN-TEED'S OWN PROJECTIONS WAS BARRED BY THE LAW OF THE CASE.

At the first trial of this case, *Certain-Teed's own projections of CUSCO's future earnings were the only damage testimony admitted.* On the first appeal, Certain-Teed did not object to the admissibility of this evidence. Because of its failure to raise the issue on the first appeal, Certain-Teed should have been barred from raising the same issue at a second trial.

> "Defendants are also precluded from now litigating the existence of an implied cause of action for damages for their violations of the ICA because of the principle of the law of the case. * * * It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the

> case than one who had argued and lost." *Fogel* v. *Chestnutt*, 668 F.2d 100, 108-109 (2nd Cir. 1981)

See also *Doe* v. *New York City Dept. of Social Services*, 709 F.2d 782 (2nd Cir. 1983), cert. den. 104 S.Ct. 195. Permitting Certain-Teed to refrain from raising issues on a first appeal, and then allowing it to assert them at a second trial and later appeal could endlessly prolong litigation in future cases. These rulings needlessly prejudiced CUSCO, which after 7½ years of proceeding through the Courts, has been prevented from proving up compensatory damages in this case.

CONCLUSION

Almost nine years have passed since the Certain-Teed contract was signed. Two juries have found the facts sufficiently aggravated to warrant punitive damages. Despite two trials and two appeals, CUSCO has yet to receive any compensation. In addition, CUSCO has incurred substantial expense in re-litigating this matter. For the reasons set forth in this appeal, the awards under both the fraud and breach of contract counts are inadequate. Also, the punitive damage award under the fraud count has been reduced. Nevertheless, CUSCO joins this Court and also seeks an end to this ". . . long trail a winding."

CUSCO does not request that the amount of punitive damages be retried because it would require virtually a retrial of the entire case to assess Certain-Teed's misconduct. *CUSCO does not appeal the award of either compensatory or punitive damages*

under the fraud count. CUSCO seeks a new trial limited to the issue of compensatory damages under the contract count.

Certain-Teed has been proven guilty of fraud by "clear and convincing evidence" twice in the last five years. Yet, CUSCO has been denied an opportunity to fairly present its compensatory damages proof under the contract count. CUSCO respectfully requests rehearing limited to the question of compensatory damages under the contract count. Under a new trial for damages limited to the contract count, Certain-Teed can be allowed credit for compensatory damages paid under the fraud count. Compensatory and punitive damages assessed under the fraud count should be paid now, with statutory prejudgment and post-judgment interest and costs. A new trial limited to compensatory damages should be ordered under the contract count in accordance with specific directions by this Court.

Ordering a new trial on all the issues in this cause would serve to impose further economic hardship on CUSCO and insure another appeal. Certain-Teed cannot be permitted to escape the consequences of its fraudulent and unfair conduct by forcing CUSCO to endlessly litigate both the same and different issues created by resourceful defense counsel until it finds a jury that will accept its incredible version of the facts or until the repeated economic burden of this

litigation forces CUSCO to eventually withdraw from the market place or abandon its claim.

Respectfully Submitted,

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